

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES LEWIS, et al.,
Plaintiff,

v.
CITY OF FRESNO, et al.,
Defendants.

1:08-cv-01062-OWW-GSA
MEMORANDUM DECISION RE:
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AGAINST GERALD MILLER
(Doc. 73)

I. INTRODUCTION.

Gerald Miller ("Plaintiff") proceeds with this action pursuant to 42 U.S.C. 1983 and California Government Code §12900.

Defendants filed a motion for summary judgment on May 6, 2011. (Doc. 73). Plaintiff filed opposition on June 6, 2011. (Doc. 82). Defendants filed a reply on June 13, 2011. (Doc. 91).

II. FACTUAL BACKGROUND.

Plaintiff is an African American police officer employed by the Fresno Police Department ("Department").

On September 10, 2007, Plaintiff was driving his personal vehicle on Fowler Avenue near the intersection of Tulare in Fresno County while off-duty. A vehicle passed Plaintiff, and a few moments later, Officer Anthony Bustos ("Bustos") activated his lights, drove past Plaintiff's vehicle, and initiated a traffic

1 stop of the vehicle that had passed Plaintiff. The vehicle pulled
2 into a Seven-Eleven Parking lot, followed by Bustos. Plaintiff
3 also drove into the Seven-Eleven parking lot and parked in front of
4 the entrance to the store.

5 As Plaintiff exited his vehicle, Bustos pointed his finger at
6 Plaintiff and yelled "you're lucky you're not getting a ticket
7 too." Miller responded "for what?" and Bustos replied "speeding."
8 Plaintiff started to turn toward the store and said in an angry
9 voice "you need to get on with that." Bustos then asked Plaintiff
10 for identification.

11 Plaintiff walked to the passenger side of his vehicle, opened
12 the door, got his driver's license and police ID out of his wallet,
13 and handed both items to Bustos. Plaintiff started to walk
14 alongside the driver's side of his vehicle towards the store and
15 Bustos ordered him to stop. Plaintiff started back in the store
16 saying, "you have my IDs right there." Bustos told Plaintiff that
17 if he went in the store he would be arrested. Bustos requested
18 assistance and other officers arrived on scene, including Sergeant
19 John Chandler. Plaintiff made known his objections to his
20 detention.

21 On October 24, 2007, Plaintiff appeared in court with legal
22 counsel, Franz Criego, for the traffic citation issued by Bustos.
23 During the course of questioning Officer Bustos, Criego made a
24 comment using the term "DWB" to which Bustos responded "your Honor,
25 I'm now being accused of racist remarks and I probably think we
26 ought to have the City Attorney here now." Although Plaintiff's
27 hearing was the last hearing scheduled that day, three officers
28 from the Department remained in the courtroom during his hearing,

1 including Officer Stuart Riba.

2 On September 11, 2007, Plaintiff lodged a formal citizen's
3 complaint regarding to Bustos' conduct during the September 10,
4 2007 traffic stop. An Internal Affairs investigation was conducted
5 by Bustos' supervisor, John Chandler, who had responded to the
6 scene. On November 7, 2007, Chandler prepared a Memorandum
7 directed to Department Chief Jerry Dyer through Captain Greg Garner
8 and officer Patrick Farmer identified as Personnel Complaint IA
9 2007-0120. Plaintiff's name was handwritten on the face of the
10 November 2007 memorandum as an accused. The November 2007
11 Memorandum states a finding that Plaintiff violated professionalism
12 standards. Plaintiff was never informed of the investigation as
13 required by Department policy.

14 On October 25, 2007, the day after Plaintiff's traffic court
15 hearing, an Internal Affairs investigation was initiated against
16 Plaintiff contending he had engaged in misconduct at the hearing by
17 (a) identifying himself as an officer; (b) contending the citation
18 was racially motivated; (c) accessing records improperly or for an
19 improper purpose; and (d) using profanity at the hearing. The
20 October 2007 Internal Affairs instigation was conducted by Sgt.
21 Mindy Medina-Casto.

22 On September 8, 2008, Plaintiff filed a complaint with
23 California's Department of Fair Employment and Housing ("DFEH")
24 alleging that the City had failed to prevent race discrimination
25 and/or retaliation with reference to the subject traffic incident
26 and the court appearance.

27 In 2009, Plaintiff was involved in a collision on duty when
28 another car ran a red light. The matter went through an Internal

1 Affairs investigation and Plaintiff received a documented oral
2 reprimand.

3 In 2010, Plaintiff was written up for insubordination by Sgt.
4 Alvarez. Plaintiff protested that he felt Alvarez's conduct was
5 racially motivated. No investigation of the alleged racial
6 harassment was conducted.¹

7 **III. LEGAL STANDARD.**

8 Summary judgment/adjudication is appropriate when "the
9 pleadings, the discovery and disclosure materials on file, and any
10 affidavits show that there is no genuine issue as to any material
11 fact and that the movant is entitled to judgment as a matter of
12 law." Fed. R. Civ. P. 56(c). The movant "always bears the initial
13 responsibility of informing the district court of the basis for its
14 motion, and identifying those portions of the pleadings,
15 depositions, answers to interrogatories, and admissions on file,
16 together with the affidavits, if any, which it believes demonstrate
17 the absence of a genuine issue of material fact." *Celotex Corp. v.*
18 *Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks
19 omitted).

20 Where the movant will have the burden of proof on an issue at
21 trial, it must "affirmatively demonstrate that no reasonable trier
22 of fact could find other than for the moving party." *Soremekun v.*
23 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With
24 respect to an issue as to which the non-moving party will have the
25 burden of proof, the movant "can prevail merely by pointing out
26 that there is an absence of evidence to support the nonmoving

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28 ¹ Plaintiff's allegation concerning the 2010 action by Alvarez is not alleged in
the complaint.

1 party's case." *Soremekun*, 509 F.3d at 984.

2 When a motion for summary judgment is properly made and
3 supported, the non-movant cannot defeat the motion by resting upon
4 the allegations or denials of its own pleading, rather the
5 "non-moving party must set forth, by affidavit or as otherwise
6 provided in Rule 56, 'specific facts showing that there is a
7 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting
8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "A
9 non-movant's bald assertions or a mere scintilla of evidence in his
10 favor are both insufficient to withstand summary judgment." *FTC v.*
11 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[A] non-movant must
12 show a genuine issue of material fact by presenting affirmative
13 evidence from which a jury could find in his favor." *Id.* (emphasis
14 in original). "[S]ummary judgment will not lie if [a] dispute about
15 a material fact is 'genuine,' that is, if the evidence is such that
16 a reasonable jury could return a verdict for the nonmoving party."
17 *Anderson*, 477 U.S. at 248. In determining whether a genuine dispute
18 exists, a district court does not make credibility determinations;
19 rather, the "evidence of the non-movant is to be believed, and all
20 justifiable inferences are to be drawn in his favor." *Id.* at 255.

21 **IV. DISCUSSION.**

22 **A. FEHA Claims**

23 California's Fair Employment and Housing Act ("FEHA") makes it
24 an "unlawful employment practice" for any employer "because of the
25 race...to discriminate against the person in compensation or in
26 terms, conditions, or privileges of employment." Cal. Gov. Code, §
27 12940(a). The elements of a FEHA claim for employment
28 discrimination are (1) the employee's membership in a

1 classification protected by the statute; (2) discriminatory animus
2 on the part of the employer toward members of that classification;
3 (3) an action by the employer adverse to the employee's interests;
4 (4) a causal link between the discriminatory animus and the adverse
5 action; (5) damage to the employee, and (6) a causal link between
6 the adverse action and the damage. *Mamou v. Trendwest Resorts,*
7 *Inc.*, 165 Cal. App. 4th 686, 713 (Cal. Ct. App. 2008).

8 FEHA's discrimination provision addresses only explicit
9 changes in the "terms, conditions, or privileges of employment."
10 *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 706 (Cal. 2010) (citing
11 (§ 12940(a)). In the case of an institutional or corporate
12 employer, the institution or corporation itself must have taken
13 some official action with respect to the employee, such as hiring,
14 firing, failing to promote, adverse job assignment, significant
15 change in compensation or benefits, or official disciplinary
16 action. *Id.*

17 Plaintiff identifies three alleged adverse employment actions
18 taken against him: (1) a "blue sheet" counseling memo he received
19 on November 7, 2007 stating that he "violated professionalism"
20 during the traffic stop by using profanity; this is official
21 disciplinary action; (2) an Internal Affairs investigation related
22 to his conduct during the court hearing on his speeding ticket; and
23 (3) the disciplinary action taken against him in 2010 by Alvarez.
24 (Doc. 82, Opposition at).² However, the alleged discriminatory
25 action taken by Alvarez occurred *after* Plaintiff filed the
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28 ² The complaint also alleges that reassignment of Bustos to Plaintiff's division was retaliatory, but Plaintiff has apparently abandoned this theory.

1 complaint in February 2009. To the extent Plaintiff has FEHA
2 claims arising out of Alvarez's conduct, such claims are beyond the
3 ambit of the complaint.³

4 **1. FEHA Discrimination**

5 Plaintiff contends that the blue sheet he was issued in 2007
6 and the Internal Affairs investigation concerning his conduct at
7 the court hearing on his speeding ticket were racially motivated.
8 Plaintiff provides no direct evidence of racial animus;
9 accordingly, Plaintiff must rely on the McDonald Douglass
10 framework. *See, e.g., Guz v. Bechtel National, Inc.*, 24 Cal. 4th
11 317, 354 (Cal. 2000). Under the McDonald Douglass framework,
12 absent evidence of circumstances supporting an inference racial
13 discrimination, there is a failure of proof. *Id.*

14 It is undisputed that the individual responsible for issuing
15 the blue sheet to Plaintiff was Deputy Chief Nevarez. It is also
16 undisputed that Nevarez decision was not based on Plaintiff's race.
17 (Doc. 82-1, Plaintiff's Response to DUMF No. 26). Finally, it is
18 undisputed that Nevarez has issued blue sheets to non-African
19 American officers for using profanity in public, and that Bustos
20 also received a blue sheet in connection with the traffic stop
21 incident. (Doc. 82-1, Plaintiff's Response to DUMF Nos. 25, 27).
22 There is no evidence that the blue sheet Nevarez issued was
23 motivated by racial animus.

24 Plaintiff also contends that the Internal Affairs
25 investigation was motivated by racial discrimination. It is
26 undisputed that Officer Riba made the decision to report

27
28 ³ Allegations against Alvarez may be considered for their probative value to the extent such allegations are relevant to the claims pled in the complaint.

1 Plaintiff's conduct during the court hearing, leading to the
2 Internal Affairs investigation. Other than Plaintiff's race, no
3 evidence is offered that Riba was motivated by racial animus.

4 **2. FEHA Retaliation**

5 An employee is protected from retaliation even if there is no
6 discrimination in fact, provided the employee has a reasonable,
7 good faith belief that FEHA is being violated. *E.g., Sada v.*
8 *Robert F. Kennedy Med. Ctr.*, 56 Cal. App. 4th 138, 160 n.27 (Cal.
9 1997) (citations omitted). Accordingly, the fact that Plaintiff's
10 substantive claims of racial discrimination lack evidentiary
11 support does not preclude his retaliation claim.⁴

12 Whether the actions Plaintiff complains of were retaliatory is
13 subject to factual disputes that preclude summary judgment.
14 Plaintiff objected to perceived racial discrimination in both his
15 citizen's complaint to the Department and at his court hearing on
16 the citation. Shortly thereafter, Plaintiff was issued a blue
17 sheet and subjected to an Internal Affairs investigation. The
18 temporal proximity of the blue sheet and Internal Affairs
19 investigation to Plaintiff's protected activity raises an inference
20 of retaliation sufficient to defeat summary judgment. A memorandum
21 prepared in connection with the Internal Affairs investigation
22 suggests that Plaintiff would have been subjected to discipline but
23 for the investigator's conclusion that Plaintiff did not know his
24 attorney would make allegations of discrimination against Busto.
25 (Doc. 82-11 at 34, Ex. 9 to Church Decl.). The memorandum
26 provides, in pertinent part:

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28 ⁴ Whether Plaintiff had a reasonable good faith belief that he was being
discriminated against is a factual question that remains open.

1 Had Miller known his attorney was going to make racial
2 allegations against [Busto] on the witness stand,
3 Miller's identification of himself as an officer would
4 have amounted to a lack of sound judgment. Although the
5 racial profiling allegations made against [Busto]
undoubtedly discredited the Department because two Fresno
Police Officers were involved, Miller was not directly
responsible for it.

6 A jury presented with the Internal Affairs memorandum could draw
7 the reasonable inference that the Department considers an officer's
8 objection to alleged racial discrimination conduct worthy of
9 reprimand to chill such complaints. The evidence Plaintiff has
10 presented is sufficient to create a factual dispute on the issue of
11 whether the blue sheet and Internal Affairs investigation were
12 retaliatory for Plaintiff's claim of race discrimination in the way
13 his traffic matter was handled by Bustos and the Department.

14 Defendants contention that neither the blue sheet nor the
15 Internal Affairs investigation constituted adverse action within
16 the meaning of FEHA is unavailing. *See, e.g., Plymale v. City of*
17 *Fresno*, 2009 U.S. Dist. LEXIS 58920 * 12-14 (E.D. Cal 2009) (noting
18 lack of binding authority for proposition that Internal Affairs
19 investigation was not adverse action and that investigation
20 disrupted employment). Defendant's authorities do not conclusively
21 establish the actions Defendant complains of are insufficient as a
22 matter of law to constitute adverse employment action. Summary
23 judgment on Plaintiff's FEHA retaliation claim is DENIED

24 **B. Section 1983 Claim**

25 Section 1983 requires a claimant to prove "(1) that a person
26 acting under color of state law (2) committed an act that deprived
27 the claimant of some right, privilege or immunity protected by the
28 Constitution or laws of the United States." *E.g., Browne v. San*

1 *Francisco Sheriff's Dep't*, 616 F. Supp. 2d 975, 982 (N.D. Cal.
2 2009) (citing *White v. Roper*, 901 F.2d 1501, 1503 (9th Cir. 1990)).
3 The complaint alleges violation of Plaintiff's rights under the
4 Fourteenth and Fourth Amendments arising out of Bustos' issuance of
5 the speeding ticket to Plaintiff.

6 The Fourth Amendment to the United States Constitution
7 prohibits unreasonable seizures. The reasonableness of a
8 particular seizure requires balancing of the nature and quality of
9 the seizure against the governmental interest at stake. See, e.g.,
10 *Liberal v. Estrada*, 632 F.3d 1064, 1079 (9th Cir. 2011). Traffic
11 stops are investigatory stops that must be based on reasonable
12 suspicion that a traffic law violation occurred. E.g., *id.* at
13 1077; *United States v. Willis*, 431 F.3d 709, 714 (9th Cir. 2005).
14 Reasonable suspicion consists of "specific, articulable facts
15 which, together with objective and reasonable inferences, form the
16 basis for suspecting that the particular person detained is engaged
17 in criminal activity.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan*,
18 92 F.3d 1486, 1496 (9th Cir. 1996). A "gloss on this rule
19 prohibits reasonable suspicion from being based on broad profiles
20 which cast suspicion on entire categories of people without any
21 individualized suspicion of the particular person to be stopped."
22 *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1492 (9th Cir.
23 1994).

24 Plaintiff contends that Bustos did not have probable cause to
25 detain Plaintiff or to issue him a traffic citation for speeding.
26 Probable cause was not required, however, as reasonable suspicion
27 is the standard applicable to traffic stops. *Id.*; accord *Liberal*,
28 632 F.3d at 1078 (noting lack of reasonable suspicion where no

1 traffic law had been violated). Further, Plaintiff's contention
2 that "Bustos did not assert his authority until after probable
3 cause for [the citation's] initial issuance had dissipated" is
4 devoid of merit.⁵ Reasonable suspicion of a traffic violation
5 based on an officer's personal observations does not "dissipate"
6 with the passage of a few moments. The operative inquiry is
7 whether Bustos observed sufficient objective facts that, combined
8 with reasonable inferences, a reasonable suspicion of a traffic
9 violation existed.

10 Bustos submits a sworn declaration which states that he
11 observed three vehicles traveling approximately 35-38 miles per
12 hour in a 25 miles per hour school zone. Bustos states that
13 Plaintiff's vehicle was the third vehicle, and that he clocked
14 Plaintiff at 35 mph on his radar. Bustos made the decision to pull
15 over the second vehicle, which he believed had been driving faster
16 than the first vehicle. Plaintiff disputes whether Bustos' radar
17 could have differentiated between his vehicle and the other two.
18 Assuming *arguendo* this is a genuine factual dispute, it is
19 immaterial. Even if one of the other three vehicles was the
20 vehicle registered by Bustos' radar, Bustos had sufficient
21 opportunity to observe the events to lead him to reasonably suspect
22 that Plaintiff was traveling in excess of the posted speed limit.

23 There is no allegation that Bustos' seizure of Plaintiff was
24 unnecessarily protracted or otherwise unreasonable. If Bustos' had
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26 ⁵ Equally devoid of merit is Defendants' contention that no seizure was effected.
27 Accepting Plaintiff's version of the facts as true, Bustos restrained Plaintiff's
28 movement and ordered him to remain stationary under threat of arrest. It is
unnecessary to address Defendants' invocation of *Heck v. Humphrey*, 512 U. S. 477
(1994), as Plaintiff's section 1983 claim does not survive.

1 reasonable suspicion to believe Plaintiff was speeding, Plaintiff
2 cannot prevail on a Fourth Amendment claim arising out of his
3 traffic stop. Summary judgment is GRANTED as to this claim.

4 **2. Fourteenth Amendment Claim**

5 Plaintiff contends that his speeding ticket was racially
6 motivated. Plaintiff presents no evidence in support of his
7 allegation of racial animus on Bustos' part, however. Instead,
8 Plaintiff makes the conclusory assertion that "similarly situated
9 persons would not have been subjected to Bustos' selective
10 enforcement and issuance of a traffic citation." This
11 inferentially suggests that other officers are not cited under
12 comparable circumstances. However, Plaintiff offers no evidence
13 that such asserted practice is preferential treatment of fellow
14 officers suspected of traffic violations based on race. Plaintiff
15 does not identify any similarly situated individuals. Summary
16 judgment is GRANTED as to this claim.

17 **3. Monell Claim**

18 As Plaintiff has no valid civil rights claim under section
19 1983, there is no basis for Monell liability. Summary judgment is
20 GRANTED as to this claim.

21 **ORDER**

22 For the reasons stated, IT IS ORDERED:

23 1) Summary judgment is GRANTED on Plaintiff's FEHA
24 discrimination claim;

25 2) Summary judgment is DENIED on Plaintiff's FEHA retaliation
26 claim;

27 3) Summary judgment is GRANTED on Plaintiff's federal claims;

28 and

1 4) Defendants shall submit a form of order consistent with
2 this memorandum decision within five (5) days of electronic
3 service of this decision.

4 IT IS SO ORDERED.

5 **Dated: July 13, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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